

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant:	John W. Forsberg; Mark E. Schommer; David P. Olson; William C. Phillips; Alex C. Toy; Charles R. Lewis, Jr.	Confirmation No.	9349
Serial No.:	10/693,005		
Filed:	October 24, 2003	Customer No.:	28863
Examiner:	Christopher A. Flory		
Group Art Unit:	3762		
Docket No.:	1023-294US01		
Title:	MEDICAL DEVICE PROGRAMMER WITH INFRARED COMMUNICATION		

PETITION UNDER 37 C.F.R. § 1.181(a) TO REQUEST DESIGNATION OF NEW GROUNDS OF REJECTION IN SUPPLEMENTAL EXAMINER'S ANSWER

Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

Dear Sir:

Appellant petitions the Director under 37 C.F.R. § 1.181(a) to request that a new ground of rejection set forth in the Supplemental Examiner's Answer dated September 23, 2009 be properly designated as a new ground of rejection.

In the Examiner's Answer, the Examiner asserted that, with respect to claim 15, "[r]emoval of the battery cover of [almost any style cell phone] reveals that the antenna extends into the battery bay."¹ Thus, the Examiner appears to be relying on personal knowledge of cell phones at the time Appellant's application was filed and the examination of the structure of a particular cell phone to support the rejection of claim 15. Although presented for the first time in the Supplemental Examiner's Answer, the Examiner did not designate the foregoing reason for the rejection of claim 15 as a new ground of rejection. Appellant's Supplemental Reply Brief is

¹ Supplemental Examiner's Answer dated September 23, 2009, page 19.

submitted herewith as further support of the impropriety of the Examiner's presentation of undesignated new grounds of rejection in the Examiner's Answer.²

For at least these reasons, Appellant respectfully requests that the foregoing ground of rejection of claim 15 presented in the "Response to Argument" section of the Supplemental Examiner's Answer be designated as new grounds of rejection. This will provide Appellant with the opportunity to request an affidavit or declaration from the Examiner that provides the specific information relating to the assertion of personal knowledge, as well as an explanation of the assertion of personal knowledge. In addition, the designation of the new ground of rejection of claim 15 as such will permit Appellant to contradict the Examiner's assertion of personal knowledge. As provided in 37 C.F.R. 1.104(d)(2), "when a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons."

No fee is believed due. Please apply any deficiencies or credits to Deposit Account No. 50-1778.

Date:

By:

November 23, 2009
SHUMAKER & SIEFFERT, P.A.
1625 Radio Drive, Suite 300
Woodbury, Minnesota 55125
Telephone: 651.286.8346
Facsimile: 651.735.1102

Jessica H. Kwak
Name: Jessica H. Kwak
Reg. No.: 58,975

² See, e.g., Appellant's Supplemental Reply Brief at pp. 7 and 8.